BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Department of Labor ("DOL") interim regulation's "disability causation" and "presence of pneumoconiosis" rebuttal tests at 20 C.F.R. § 727.203(b)(3) and (b)(4) violate the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), when applied to claimants who establish that they meet the invocation requirement of the DOL interim regulation at § 727.203(a)(3) by blood gas study evidence.

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit the Secretary of Labor from imposing "disability causation" and "presence of pneumoconiosis" factual inquiries for black lung benefits under the DOL interim regulation, violates the due process clause of the fifth amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Statutory And Regulatory Background	1
B. This Litigation	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	Page
Collins v. *Old Ben Coal Co.*, 861 F.2d 481, 483 (7th Cir. 1988) (Easterbrook, J., concurring)	8
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988)	3, 5, 7, 8
Taylor v. *Peabody Coal Company*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed* 58 U.S.L.W. 3724 (U.S. May 2, 1990) (No. 89-1696)	7, 8
CONSTITUTIONAL PROVISION AND STATUTE:	
U.S. CONST. amend. V	i, 1
Black Lung Benefits Act of 1972, Pub. L. 92-303, 86 Stat. 150 (1972), 30 U.S.C. §§ 901 *et seq.* (1988)	i, 1, 2
§ 401(a), 30 U.S.C. § 901(a)	1
§ 402(f)(2), 30 U.S.C. § 902(f)(2)	i, 1, 3-10, 12, 13
§ 413(b), 30 U.S.C. § 923(b)	8
§ 422(c), 30 U.S.C. § 932(c)	1
§ 422(j), 30 U.S.C. § 932(j)	1
26 U.S.C. § 9501(d)(1)	1
30 U.S.C. § 902(f) (1970 and Supp. II) (1972)	i, 1
42 U.S.C. § 423(d)(1)(a)	12
REGULATIONS:	
20 C.F.R. Part 404, Subpart P, Appendix 1 § 302 Table III-A	12
20 C.F.R. Part 410, Subpart D	12
§ 410.412	1
§ 410.416	9
§ 410.424(b)	12
§ 410.456	9
§ 410.490	1, 5
§ 410.490(b)(1)(i)	1, 6, 9, 10
§ 410.490(b)(1)(ii)	1, 6, 9, 10
§ 410.490(b)(2)	9
§ 410.490(b)(3)	9
PART 718:	
§ 718.103(a)	11
§ 718.105(a)	11
PART 727:	
§ 727.203	1

Table of Authorities Continued

	Page
§ 727.203(a)(1)	10
§ 727.203(a)(2)	10
§ 727.203(a)(3)	i, 1, 2, 6, 10, 11
§ 727.203(a)(4)	10
§ 727.203(a)(5)	10
§ 727.203(b)	5
§ 727.203(b)(3)	*passim*
§ 727.203(b)(4)	*passim*
§ 727.206(b)(2)(ii)	11
45 Fed. Reg. 13683 (1980)	11
Coal Miner's Benefits Manual (Part IV) TI #21, Supp 2, Exhibit G	11
LEGISLATIVE MATERIALS:	
S. Rep. No. 743, 92d Cong., 2d Sess. (1972)	11
MISCELLANEOUS:	
Briefs and Appendix	
Bethenergy Mines, Inc. v. *Director, O.W.C.P. and Pauley*, 890 F.2d 1295 (3d Cir. 1989), *petition for cert. granted*, 59 U.S.L.W. 3715 (Oct. 29, 1990) (No. 89-1714).	
Brief for Petitioner Harriet Pauley (No. 89-1714) (U.S. Supreme Court)	1
Consolidation Coal Co. v. *Director, O.W.C.P. and Albert C. Dayton*, 895 F.2d 173 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3725 (October 29, 1990) (No. 90-114).	
Brief for Respondent Albert C. Dayton (No. 90-114) (U.S. Supreme Court)	9, 12, 13
Taylor v. *Clinchfield Coal Co. and Director, O.W.C.P.*, 895 F.2d 178 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3725 (Oct. 29, 1990) (No. 90-113).	
Brief for the Director, O.W.C.P.	6
Joint Brief for the Petitioners' ClinchfieldCoal Co. and Consolidation Coal Co.	6
Taylor v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 3725 (U.S. May 2, 1990) (No. 89-1696).	
Appendix at 21, *Peabody Coal Co.* v. *Taylor*, No. 89-1696 (U.S. Supreme Court)	8

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution; Sections 401(a), 402(f), and 422(c) and (j) of the Black Lung Benefits Act, 30 U.S.C. §§ 901(a), 902(f), 932(c), (j); 26 U.S.C. § 9501(d)(1); 20 C.F.R. §§ 410.412, 410.490, 727,203, 89-1714 App. 1-13 sets forth each of these provisions.[1]

STATEMENT

A. Statutory And Regulatory Background

In her brief to this Court in No. 89-1714, petitioner Harriet Pauley reviews the statutory and regulatory background relevant to this case, except for the operation of the HEW interim provisions at 20 C.F.R. § 410.490[2] in "ventilatory study" cases like respondent Dayton's case, No. 90-114.[3] However, respondent Dayton does analyze

---

[1] The "89-1714 App." is the Appendix to the Brief for Petitioner Harriet Pauley in No. 89-1714, with which this case and No. 90-114 are consolidated. Citations to "Pet. App." and to "90-114 Pet. App." are to the Appendices to Clinchfield Coal Company's petition for certiorari in this case and to Consolidation Coal Company's petition for certiorari in No. 90-114, respectively.

[2] Like petitioner Pauley, we often refer to 20 C.F.R. § 410.490 as the "HEW interim provision," which is its popular name. Similarly, we often refer to 20 C.F.R. § 727.203 as the "DOL interim regulation." The citations to various provisions of 20 C.F.R. usually omit the "20 C.F.R." citation.

[3] As petitioner Pauley explains in her brief ("89-1714 Pet. Br."), "ventilatory study" cases are cases in which miners invoke the presumption that the HEW interim provision confers by ventilatory study evidence under § 410.490(b)(1)(ii). 89-1714 Pet. Br. at 7 and n.7; *see also* 90-114 Pet. App. at 8-9. In contrast, "blood gas study" cases are ones in which the miners, like respondent Taylor here, invoke the similar presumption under the DOL interim regulation by blood gas study evidence under § 727.203(a)(3). 89-1714 Pet. Br. at 7 and n.7. *See* Pet. App. at 5a, 26a. The third of the consolidated cases before the Court, No. 89-1714, is an "x-ray" case, one in which the miner John Pauley invoked the HEW interim presumption by x-ray evidence under § 410.490(b)(1)(i). 89-1714 Pet. Br. at 7 and n.7.

the operation of the HEW interim provision in ventilatory study cases and, for the reasons discussed in the Argument Section *infra*, that analysis also explains the operation of the HEW interim provision as it is relevant to blood gas study cases like Mr. Taylor's here.

B. This Litigation

Mr. Taylor was employed for almost twelve years in this nation's coal mines as a coal loader and roof bolter. Pet. App. at 23a-24a. Because Mr. Taylor worked for Clinchfield Coal Company as a roof bolter from 1969-72, Pet. App. at 23a, Clinchfield was identified as the responsible operator by the Department of Labor. Pet. App. at 24a.

On November 5, 1976, Mr. Taylor applied for benefits under the Black Lung Benefits Act. Because of the date of application, the claim was evaluated under the Department of Labor interim regulations. Pet. App. at 5a. After benefits were awarded by the Deputy Commissioner of the Department of Labor, Clinchfield contested Mr. Taylor's entitlement. Pet. App. at 5a.

On December 14, 1983, a hearing was held in Abingdon, Virginia before an administrative law judge (ALJ). The ALJ invoked the interim presumption in § 727.203(a)(3) finding that Mr. Taylor had more than ten years of coal mine employment and had presented qualifying arterial blood gas studies. The ALJ then denied the claim because he concluded that the company rebutted the presumption pursuant to §§ 727.203(b)(3) and (b)(4), Pet. App. at 5a, after finding that Mr. Taylor did not have pneumoconiosis and was "not totally disabled from this disease."[4] The

[4] The Court of Appeals, besides concluding that the Secretary improperly applied § 727.203(b)(3) and (b)(4) to this case, also concluded that the ALJ's "conclusion . . . will not support a finding rebuttal under (b)(3) as to causation. That finding is quite obviously erroneous as a matter of law. Pet. App. at 6a. Thus, if the DOL rebuttal test at § 727.203(b)(3) is found to be valid, the ALJ's application of an erroneous § 727.203(b)(3) standard mandates that this case be remanded to the ALJ for application of the proper standard.

Benefits Review Board affirmed the denial on May 14, 1987. Pet. App. at 17a-19a.

Mr. Taylor filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit. The review was granted and briefs were filed on the merits. While awaiting oral argument before the Fourth Circuit, this Court's decision in *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), invalidated the ten year requirement for invocation of the DOL interim presumption, thereby calling into question the validity of the DOL rebuttal provisions at issue here. The claimant requested and was granted permission to file a supplemental brief addressing the validity of the two additional rebuttal methods in the DOL regulation. On February 5, 1990, the court of appeals issued its decision remanding this case. Pet. App. at 4a-16a. The court held that the two additional rebuttal tests in the DOL regulation at § 727.203(b)(3) and (b)(4) were invalid because they are criteria that impose requirements that are more restrictive than those applicable to a claim filed on June 30, 1973. Clinchfield and the Director filed motions for rehearing that were denied on April 20, 1990. On July 17, 1990 Clinchfield filed a petition for writ of certiorari. This court granted the petition on October 29, 1990 and consolidated this case with Nos. 89-1714 and 90-114.

SUMMARY OF ARGUMENT

Section 402(f)(2) of the Act, which prohibits the Secretary of Labor from adjudicating claims like Mr. Taylor's

using "criteria" that are "more restrictive" than the "criteria" of the HEW interim provision, requires affirmance of the court of appeals' judgment.

Mr. Taylor invoked the DOL interim presumption by showing that he had more than ten years of coal mine employment and presenting qualifying arterial blood gas studies, a form of evidence which would not have invoked the HEW interim provision. The Director and the coal companies incorrectly argue that this distinction allows the Secretary to impose additional rebuttal tests on Mr. Taylor.

The "criteria" encompassed by Section 402(f)(2) are the substantive standards governing eligibility for benefits, not the forms of evidence used to meet those standards. Both blood gas studies and ventilatory studies address the same "criteria"; therefore, the Secretary of Labor's attempt to make rebuttal in a blood gas study case more restrictive than rebuttal in a ventilatory study case under the HEW interim provision violates Section 402(f)(2).

The "criteria" that a claimant must prove in order to invoke the HEW interim provision are the "existence of pneumoconiosis" criterion, which a claimant can prove by X-ray, biopsy, or autopsy, and the "presence of a chronic respiratory or pulmonary disease" criterion, which a claimant can prove by ventilatory study evidence. Blood gas study evidence also shows the "presence of a chronic respiratory or pulmonary disease."

In fact, blood gas study evidence has the same degree of reliability for proving the "presence of a chronic respiratory or pulmonary disease" criterion as does ventilatory study evidence. The scarcity of facilities at which blood gas studies could be performed explains the futility of

HEW establishing a blood gas study table for the HEW interim provision.

Since blood gas study evidence is just as reliable for proving the "presence of a chronic respiratory or pulmonary disease" criterion as ventilatory study evidence, the Secretary of Labor may not impose the more restrictive rebuttal tests on claimants, such as Mr. Taylor, who invoke by using blood gas study evidence. The Secretary's attempt to do so violated Section 402(f)(2) by allowing opponents in blood gas study cases to rebut the presumption using factual inquiries that, as respondent Dayton persuasively argues in his brief to this Court in No. 90-114, the HEW interim provision did not include.

Under Section 402(f)(2), blood gas study cases must be treated exactly the same as ventilatory study cases. Based upon this conclusion, we adopt respondent Dayton's arguments—explaining why the rebuttal tests at §§ 727.203(b)(3) and (b)(4) violate Section 402(f)(2) and why the resulting eligibility scheme is constitutional—as our own.

ARGUMENT

Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) teaches that, pursuant to Section 402(f)(2) of the Act, the HEW interim provision at § 410.490 sets forth the *statutory* standard of restrictiveness for the "criteria" the Secretary may apply to claims, including Mr. Taylor's claim here, that are subject to the "not . . . more restrictive" mandate of Section 402(f)(2). *Sebben*, 488 U.S. at 113-116. In this context, the questions presented here are: (1) whether any rebuttal provision of the DOL interim regulation at § 727.203(b) is inconsistent with Section 402(f)(2) (*i.e.*, whether any such rebuttal provision is "more restrictive" than the "criteria" set forth in the

HEW interim provision); and (2) if any rebuttal provision is invalid, whether applying the resulting eligibility scheme violates the due process rights of coal companies. *See id.* at 119.

Nos. 89-1174 and 90-114 present these same two questions. However, as we have explained at p. 1 and n.3 *supra*, those cases are an "x-ray case" and a "ventilatory study case," respectively, ones in which the claimant successfully invoked the HEW interim presumption by x-ray evidence under § 410.490(b)(1)(i) and by ventilatory study evidence under § 410.490(b)(1)(ii). In contrast, this case is a "blood gas study case," one in which the claimant did not invoke the HEW interim presumption at all but did invoke the DOL interim regulation by blood gas study evidence under § 727.203(a)(3), Pet. App. at 5a, 26a, a form of evidence that did not allow invocation of the HEW interim provision.

The Director and the coal companies in this case and in No. 90-114 contend that this distinction is determinative. Because the HEW interim provision cannot be invoked by blood gas study evidence, they argue, the DOL interim regulation cannot be more restrictive than the HEW interim provision in blood gas study cases, and so cannot violate Section 402(f)(2) of the Act in such cases, even though the DOL interim regulation allows the opponents of such claims to defeat the claims by rebutting them using rebuttal tests that the HEW interim provision did not provide. Brief for the Director, O.W.C.P. at n.15; Joint Brief for the Petitioners Clinchfield Coal Company and Consolidation Coal Company at 32-34.

The Director and the coal companies are wrong because they assume that forms of evidence such as x-rays, ventilatory studies, and blood gas studies are "criteria"

within the meaning of, and that set the statutory standard of restrictiveness under, Section 402(f)(2). This assumption is incorrect. The "criteria" that Section 402(f)(2) encompasses are, as we explain *infra*, substantive standards governing eligibility for benefits, not the forms of evidence utilized to meet those standards. Moreover, because the particular "criteria" that pertain to invocation of the DOL interim presumption in blood gas study cases are the identical "criteria" that pertain to invocation of the HEW interim presumption in ventilatory study cases, Section 402(f)(2)'s "not . . . more restrictive" mandate prohibits the Secretary of Labor from making rebuttal of the presumption in blood gas study cases more restrictive to the claimant than rebuttal is in ventilatory study cases under the HEW interim provision.

Section 402(f)(2)'s mandate prohibits the Secretary from adjudicating the cases subject to the section using "criteria" that are "more restrictive" (*i.e.*, less favorable to claimants) than the "criteria" of the HEW interim provision. *Sebben*, 488 U.S. at 113-16. The term "criteria" in Section 402(f)(2) means "'standard[s] on which a judgment or decision may be based.'" *Id.* at 113 (quoting Webster's Ninth New Collegiate Dictionary 307 (1983)). The "criteria" in Section 402(f)(2) are therefore the *substantive* standards that the miner must meet to establish his eligibility—either "law" standards, "fact" standards, or mixed questions of "law" and "fact" standards. They are not the permissible or mandatory forms of "evidence" that a miner employs to meet the substantive standards. A Seventh Circuit panel captured the proper distinction in denying a coal company's petition for rehearing in *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W.3725 (U.S. May 2, 1990) (No. 89-1696). The company had argued that Section 413(b) of

the Act, which requires consideration of "all relevant evidence" in the adjudication of claims, overrides the directive in Section 402(f)(2) of the Act that the Secretary of Labor not apply to claims subject to that section more restrictive "criteria" than had been applicable to claims under the HEW interim provision. The panel, drawing a distinction between "evidence" and "substantive rules of law," held that the question of whether "evidence' is admissible or must be considered in a black lung claim is distinct from the question of what "substantive . . . law" controls, and that a "standard of admissibility [for evidence] cannot control substantive law." Order denying rehearing in *Peabody Coal Co.* (No. 89-1696) at App. 21 (citing *Collins* v. *Old Ben Coal Co.*, 861 F.2d 481, 483 (7th Cir. 1988) (Easterbrook, J., concurring)).

This understanding of the term "criteria" permits identification of the particular types of "criteria" encompassed within the HEW interim provision—that is, the type of substantive standards that establish the statutory standard of restrictiveness under Section 402(f)(2). *Sebben*, 488 U.S. at 113-116. As relevant here, these criteria are: (1) all facts that are presumed under the HEW interim provision or that must be proven or disproven in order to invoke or rebut the HEW interim presumption; (2) with respect to each such fact, whether it is conclusively presumed and, if not, which party has the burden to prove or disprove it; and (3) with respect to each such fact that must be proven or disproven (though not with respect to facts that are conclusively presumed), the substantive degree of reliability to which the fact is proven or disproven.

Understanding the types of criteria encompassed within the HEW interim provision in turn permits the identification of the possible ways in which the Secretary

of Labor could apply "criteria" that are more or less restrictive than the "criteria" applicable under the HEW interim provision in violation of, or in compliance with, Section 402(f)(2)'s "not . . . more restrictive" mandate. Thus, the Secretary could add or delete a particular "fact" or strengthen or relax a particular law/fact standard to be proven or met by the miner or his opponent (*e.g.*, that the miner have a chronic respiratory or pulmonary disease or that he be able to do his usual coal mine work or its equivalent). Alternatively, the Secretary should change the party who has the burden to prove or disprove a particular fact. Finally, the Secretary could modify the substantive degree of reliability to which a particular fact must be proven or disproven.

The obvious "criteria" that a claimant must prove in order to invoke the HEW interim provision are the "existence of pneumoconiosis" criterion, which claimant can prove by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i),[5] and the "presence of a chronic respiratory or pulmonary disease" criterion, which claimants can prove by ventilatory study evidence under § 410.490(b)(-1)(ii).[6] The DOL interim regulation, besides keeping the

---

[5] Claimants who prove the "existence of pneumoconiosis" under § 410.490(b)(1)(i) invoke the HEW interim presumption if they also prove one of two other "criteria"—that their pneumoconiosis "arose out of coal mine employment," § 410.490(b)(2), or that they worked in the mines at least the ten years necessary to obtain the presumption of causation that § 410.416 or § 410.456 provides. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456).

[6] Claimants who prove the "presence of a chronic respiratory or pulmonary disease" under § 410.490(b)(1)(ii) invoke the HEW interim provision if they also prove the additional "criterion" that they worked in the mines at least ten years necessary to obtain the presumption of causation that § 410.490(b)(3) provides. *See* Brief for Respondent Albert C. Dayton in No. 90-114 at 18-19.

forms of evidence that the HEW interim provision allowed claimants to use to prove these two "criteria," *compare* §§ 727.203(a)(1) *and* (a)(2) *with* §§ 410.490(b)(-1)(i) *and* (b)(1)(ii), added three forms of evidence that claimants can use to prove the "presence of a chronic respiratory or pulmonary disease" criterion: blood gas studies (§ 727.203(a)(3)), physicians' reports (§ 727.203(a)(4)), and lay evidence (§ 727.203(a)(5)).

Two of these three additional forms of evidence—physicians' reports and lay evidence—are less reliable forms of evidence than the ventilatory study evidence that the HEW interim provision allowed claimants to use to prove the "presence of a chronic respiratory or pulmonary disease" criterion. Insofar as the addition of physicians' reports and lay evidence enlarged the range of reliability that was acceptable under the HEW interim provision in proving that fact, the Secretary made the degree of reliability that the DOL interim regulation requires in proving the fact *less restrictive* than the degree of reliability that the HEW interim provision required in proving the same fact. The Secretary was therefore free to attach any conditions to the use of physicians' reports and lay evidence to invoke the presumption without violating Section 402(f)(2) of the Act. And she did so in several ways: (a) by limiting invocation of the presumption using either physicians' reports or lay evidence to claims in which the claimants' chronic respiratory or pulmonary disease is severe enough that it is "totally disabling," §§ 727.203(a)(4), (a)(5); (b) by further limiting invocation of the presumption using lay evidence to claims in which the miners are deceased and "no medical evidence is available," § 727.203(a)(5); and (c) by allowing opponents to rebut the presumption by using the rebuttal tests at

§§ 727.203(b)(3) and (b)(4), rebuttal tests that the HEW interim provision did not allow opponents to use.

Unlike physicians' reports and lay evidence, blood gas studies, which § 727.203(a)(3) allows miners to use to invoke the presumption, are *not* a less reliable form of evidence for proving the "presence of a chronic respiratory or pulmonary disease" criterion than ventilatory studies, the form of evidence that the HEW interim provision allowed claimants to use to prove that fact. Indeed, consistent with the position of many commentators, the Secretary of Labor considers blood gas studies "the most useful measurement of the heart-lung system." 45 Fed. Reg. 13683 (1980). Like ventilatory studies, blood gas studies provide an objective measure of the extent of any existing respiratory or pulmonary impairment—blood gas studies, by measuring any impairment in the diffusion component of the respiratory system, §§ 718.105(a), 727.206(b)(2)(ii); and ventilatory studies, by measuring any impairment in the ventilation component of the respiratory system. §§ 718.103(a), 727.206(b)(2)(ii). Because blood gas studies require expensive and sophisticated equipment that was extremely scarce in the coal fields, S. Rep. No. 743, 92d Cong., 2d Sess. 18019 (1972),[7] it would have been futile for HEW to have expended the time and resources necessary to develop a blood gas study table suitable for inclusion in the HEW interim provision. Thus, HEW did not include blood gas studies as a form of evidence available under the HEW interim provision for

[7] Indeed, *no* such facilities existed in the coal fields of Virginia where Mr. Taylor lived. Coal Miner's Benefits Manual (Part IV), TI#21, Supp. 2, Exhibit G.

proving "the presence of a chronic respiratory or pulmonary disease."[8]

Because blood gas studies did not lower the degree of reliability that ventilatory studies set in proving that fact under the HEW interim provision, the inclusion of blood gas studies did not make the substantive degree of reliability that the DOL interim regulation requires in proving that fact less restrictive than the substantive degree of reliability that the HEW interim presumption required in proving the same fact. Consequently, Section 402(f)(2)'s "not . . . more restrictive" mandate prohibited the Secretary of Labor from attaching any conditions to the use of blood gas studies to invoke the presumption other than the conditions that the HEW interim provision had attached to the use of ventilatory studies to invoke its presumption. The Secretary therefore violated Section 402(f)(2) by allowing opponents to rebut the presumption in blood gas study cases by using the rebuttal tests at §§ 727.203(b)(3) and (b)(4), rebuttal tests setting forth factual inquiries that, as respondent Dayton argues persuasively in his brief to this Court in No. 90-114, the HEW interim provision did not include.

In sum, that miners in blood gas cases invoke a presumption of eligibility for benefits by a "form of evidence"

[8] A blood gas study table does appear in HEW's permanent regulations. Appendix to 20 C.F.R. Part 410, Subpart D (referenced in § 410.424(b)). However, the strict values necessary to satisfy that table simply reiterate the values in the table used to determine "total disability" under the much stricter definition of that term that the Social Security Administration used in adjudicating claims for Social Security disability benefits. 42 U.S.C. § 423(d)(1)(A) defining "total disability" as the "inability to engage in any substantial gainful activity"); 20 C.F.R. Part 404; Subpart P, Appendix 1, § 302, Table III-A. HEW never developed any blood gas study table applicable only to black lung claims.

not available under the HEW interim provision is statutorily irrelevant to whether the Secretary applies to the claims of such miners "criteria" that are more restrictive than are applicable under the HEW interim provision in violation of Section 402(f)(2). Accordingly, under Section 402(f)(2), blood gas study cases, in which the claimants seek to prove the substantive fact that they have a "chronic respiratory or pulmonary disease," must be treated exactly the same as are ventilatory study cases, in which the claimants seek to prove the identical substantive fact. This conclusion permits us to adopt respondent Dayton's arguments—explaining why the rebuttal tests at §§ 727.203(b)(3) and (b)(4) violate Section 402(f)(2) in ventilatory study cases and why the resulting eligibility scheme for black lung benefits is constitutional—as our own. *See* Brief for Respondent Albert C. Dayton in No. 90-114 at Argument §§ I and II.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

SHERRY LEE WILSON,
Client Centered Legal Services of Southwest Virginia, Inc.
P.O. Box 147
Castlewood, Virginia 24224
(703) 762-5501

Attorney for Respondent
John A. Taylor (No. 90-113)